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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

Number 1053

MRS. FRANCIS FAIRCLOTH, and RUEL FAIRCLOTH,
Petitioner,

versus

JAMES FLETCHER HESTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

L. B. KENT
311 Columbus Bank and
Trust Company
Columbus, Georgia

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IN THE
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MRS. FRANCIS FAIRCLOTH, and RUEL FAIRCLOTH,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Francis Faircloth, and Ruel Faircloth, Petitioners, herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 8, 1969.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is unreported and is printed in

Appendix A hereto, infra; page 10 . The judgment of the United States District Court of Georgia, Columbus Division, is printed in the record at page 315.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 8, 1969 (infra, appendix A, page 10.) The jurisdiction of the Court is invoked under 28 USC Section 1254(1).

QUESTION PRESENTED

Is the driver who has volunteered to take his passenger to Columbus, Georgia and to return to Chattahoochee, Florida for the gasoline it takes to make the trip, the agent of the passenger and will his negligence be imputed to the passenger, where the passenger is the one who tells the driver that she has to leave Columbus at a certain time and the driver happens to be the fiancee of the passengers daughter. Does this make the driver her agent and his negligence to be imputed to her in a suit by the passenger against a third party, under Georgia law?

STATUTES INVOLVED

Ga. Code (1933) Section 4-101 "The relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf."

Ga. Code (1933) Section 105-205 "For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent. In a suit by an infant, the fault of the parent, or of custodians selected by the parents, is not imputable to the child."

STATEMENT

Basis of Jurisdiction in the District Court, Middle District, Georgia, Columbus, Division.

Jurisdiction in the District Court was founded on Diversity of Citizenship, Title 28, United States Code.

FACTS

On June 21, 1965, at 3:00 p.m., in Lumpkin, Georgia, Francis Faircloth was injured in a wreck between the automobile, which she was riding in and the automobile of the defendant, James Fletcher Hester. Faircloth was riding in an automobile driven by David Sullivan. David Sullivan had volunteered to take Francis Faircloth from Chattahoochee, Florida to Columbus, Georgia and return for the purchase of the gasoline it takes to make the trip. Francis Faircloth told David Sullivan when she wished to leave Columbus, Georgia and return to Chattahoochee, Florida and she testified that she guessed he was driving for her. The case was tried and the Court

submitted to the jury the question whether the driver was her agent and if so, the negligence could be imputed to the passenger. A verdict was returned for the defendant. The judgment was appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals sustained the judgment.

REASONS FOR GRANTING THIS WRIT

This petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted for the following reasons:

I. The decision of the Court of Appeals in Francis and Ruel Faircloth v. James Fletcher Hester (Appendix P. 10) is in conflict with the decisions of the Court of Appeals and Supreme Court of Georgia on the question of imputed negligence to the passenger of an automobile. The court allowed the jury to determine that the driver was agent of the passenger and that the drivers negligence could be imputed to the passenger based upon the fact that the driver was the fiancee of the passengers daughter, that he was told that they had to go to Columbus, Georgia and return to Chattahoochee, Florida which he knew at the time that he volunteered to take the passenger to Columbus, Georgia and the fact that the passenger purchased the gasoline.

This is in direct conflict with the Georgia law.

II. "Where the share the expense riding in a motor vehicle is prearranged by a legally enforcable agreement, such a situation makes the passenger a passenger for hire and not a guest, and requires ordinary care on the part of the operator of the motor vehicle." *FOUNTAIN v. TIDWELL,* 92 Ga. App. 199 (1955).

III. 'Where a defendant proposes to a plaintiff that if plaintiff would buy some beer for the defendant, the defendant would provide plaintiff with a ride to a certain point and the plaintiff accepts said offer and purchases the beer for the defendant, the plaintiff becomes a passenger for hire in the car of the defendant on a ride to the agreed designation." *VARGA v. WILLIAMSON,* 110 Ga. App. 684.

IV. Any agreement for the payment of compensation for transportation which is shown to have been executed in whole or in part would be sufficient to change the relationship of the parties from that of mere host and invited guest and to charge the driver with the duty of exercising a greater degree of care then is imposed upon a gratutitious host. The passenger Hogan paid $1.00 on the gasoline for a trip from August, Georgia to Atlanta and return. Court held: passenger for hire: negligence not imputable. *SALLEY v. HOGAN,* 104 Ga. App. 876.

V. The plaintiff (land owner) sued adjoining defendant (land owner) for personal property and damages as a result of a fire being caused by the defendants financee

who was cleaning defendants place; the fire occurred two days before wedding of defendant and fiancee. Court held: evidence insufficient to show the relationship of principal and agent, between the defendant and his fiancee's negligence so as to charge the defendant with his negligence in the burning of the plaintiffs property. *BASINGER v. HUFF,* 98 Ga. App. 288.

VI. A driver of a taxi cab is not the agent of the passenger, nor is his negligence imputable to the passenger notwithstanding the passenger dictates where to go and when to go. *EAST TENNESSEE, Va. and Ga. RAILWAY COMPANY v. MARKENS,* 88 Ga. App. 60; *METROPOLITAN RAILROAD COMPANY v. POWELL,* 89 Ga. 601.

VII. Passengers, (husbands and wives), one couple owning the automobile and the other couple paying for gasoline and tires and repairs and to assist in the driving; a collision taking place during the progress of the trip, and injuring the passengers, court held that the evidence demanded the status of the passengers to be passengers for hire and that the negligence of the driver was not imputable to the passengers. *OWENS v. WHITE,* 103 Ga. App. 459.

The facts in Faircloth v. James Fletcher Hester case demands that the negligence of the driver is not to be imputed to the passenger and that the passenger be classified as a passenger for hire.

In the Fifth Circuit Court of Appeals opinion, the court cites *CORONET v. MCWATERS,* 101 Ga. App. 120; this case is one where the minor is the driver and the mother is the passenger. In Georgia by decision and statute the control of the minor vest in the parents. Consequently the negligence of the minor could be imputed to the parents since the parent has control.

The court further used the case of *WARNER v. ELLIOT,* 96 Ga. App. 778 and [redacted] involved an agents authority to control employees and operate a saw mill on a holiday, thereby causing damages. The question was whether the agent had authority to operate and if he committed any negligence. A motion for non-suit was made after plaintiffs evidence had been presented. The court held that if there was any evidence of agents authority and negligence it should have been submitted to the jury.

The facts in the Faircloth case is not in conflict or in dispute. It is a simple question of whether the jury should have been charged to the effect that the drivers negligence was not imputed to the passenger.

The facts demand that the negligence of the driver be not imputed to the passenger as a matter of law. It was requested.

The opinion of the Fifth Circuit Court of Appeals has set the law of Georgia back one hundred years on imputed negligence. Ever since the codification of a

Georgia Code from the case of *EAST TENNESSEE RAILWAY COMPANY v. MARKENS*, 88 Ga. 60.

The issue presented in this petition is of great importance in that two lines of decisions has been overruled in Georgia by the Fifth Circuits opinion.

1. The passenger for hire decisions.
2. The imputed negligence decisions.

The Fifth Circuit Court of Appeals decisions [redacted]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

L.B. Kent,
Counsel For Petitioner

Counsel of Record
311 Columbus Bank and Trust Company
Columbus, Georgia

Date

CERTIFICATE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to opposing counsel of record this day of January, 1969.

L. B. [redacted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26390

MRS. FRANCES FAIRCLOTH and RUEL FAIRCLOTH,
Appellants,

versus

JAMES FLETCHER HESTER,
Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(December 19, 1968)

Before BELL and COLEMAN, Circuit Judges
and BOYLE, District Judge.

PER CURIAM: This appeal from a judgment in an automobile collision diversity case raises two questions as to the District Court's charge to the jury. The first question is whether the evidence warranted submission to the jury of the issue whether the driver of the car in which appellant was riding, Sullivan, was appellant's agent. If the jury could have found agency, then a verdict premised on imputed negligence and comparative negligence was not out of order. In *Warner v. Elliott,* 96 Ga. App. 778, 789, 101 S. Ed. 2d 591

(1957), the Georgia Court of Appeals said: "If there is any evidence tending to establish the agency, the questions should be submitted to the jury." The evidence indicates that Sullivan was a friend of appellant's daughter. He agreed to drive appellant from

Chattahooche, Florida to Columbus, Georgia and return. Appellant told Sullivan where to go, when to leave, when to start back, and purchased the gasoline for the trip. This was sufficient evidence for the submission of the agency question to the jury. Cf. *Cornett v.McWaters,* 101 Ga. App. 120, 122, 112 S. E. 2d 797 (1960).

The second question concerns possible confusion or prejudice that might have resulted from the charge as to burden of proof. Our view is that the charge when read as a whole is in no way confusing or prejudicial.

AFFIRMED.

SUPREME COURT, U. S.

FEB 18 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Number 1053

MRS. FRANCES FAIRCLOTH
and RUEL FAIRCLOTH,

Petitioners

V.

JAMES FLETCHER HESTER,

Respondent

PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT

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In The Supreme Court Of The United States

Number_____

MRS. FRANCES FAIRCLOTH
and RUEL FAIRCLOTH,

Petitioners

V.

JAMES FLETCHER HESTER

Respondent

PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT

QUESTION PRESENTED FOR REVIEW

The question presented for review here is whether the Court of Appeals has misapplied the law of Georgia in affirming the District Court's submitting to the jury the issue of the imputability to Petitioners of the alleged negligence of the driver of the automobile in which one of the Petitioners was a passenger at the time of the accident giving rise to the law suit.

STATEMENT OF THE CASE

This action was brought to recover damages allegedly arising from an automobile collision which occurred in Lumpkin, Georgia. After a lengthy trial, the jury returned a verdict for the Defendant. Petitioners did not question the fact that there was ample evidence in the record to show that the Petitioner's driver was negligent at the time of the collision. They contended only that such negligence was not imputable to them.

The evidence upon which this question turns comes directly from the mouth of one of the Petitioners, who admitted on cross examination that she planned the trip, decided where to go, how long to stay and when to come back. She told the

driver where to drive and when to leave and start back. She paid for all of the gasoline and guessed that the driver was driving for her. (T-133)

In the light of this evidence, the District Court submitted the question of the imputability of the Petitioner's driver's negligence to the jury, and the Fifth Circuit, in its **per curiam** decision, affirmed the action of the lower court.

ARGUMENT

Petitioners apparently base their reason for review by this Court on the grounds that the decision of the Court of Appeals conflicts with the law of the State of Georgia. However, when the applicable statutes and appellate decisions are examined, it is clear that the decision of the Court of Appeals was correct and follows the Georgia law.

The rule of law in Georgia is in accord with the rule almost universally followed.[1] Here, the law is codified:

> "Imputable negligence; principal and agent; parent and child. — For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation of privity to the negligent person as to create **the relation of principal and agent.** In a suit by an infant, the fault of the parents, or of the custodians selected by the parents, is not imputable to the child." (emphasis supplied)
>
> Ga. Code (1933) §105-205

This sections appears to be an outgrowth of the earlier case law in Georgia. The rule and its exceptions appear as early as 1892:

> "7. If the plaintiff herself was free from negligence and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant and it not appearing that the she was the owner of the horse and wagon or that she had any

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[1]Blashfield, **Cyclopedia of Automobile Law and Practice,** Vol. 4, §2491, page 656, et seq.

> agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all damages consequent upon the injury, and can take no credit as to any part thereof on account of the contributory negligence of the driver of the wagon."
>
> **The Metropolitan Street Railroad Co. v. Powell**
> 89 Ga. 601 at 602,
> 16 S. E. 118

Even then, in contemporary decisions, the Courts referred to the rule as "an ancient rule".[1]

This principle has been applied down through the years without modification, so that, today, the law has crystallized into the proposition that the negligence of a driver will not be imputed to his passengers unless

1. the relation of master-servant exists;

2. the relation of principal and agent exists; or

3. the two are engaged in a joint enterprise in which the passenger has the right and exercises control over the driver.

Respondent does not now and has never contended that the first or third relationship existed between the Petitioner and her driver. There is no evidence of a contract of employment creating the relationship of master and servant, no evidence of a community of interest between passenger and driver sufficient to invoke the joint enterprise theory. Respondent does contend, however, that the evidence is more than ample to show the relationship of principal and agent.

The real question before the Court of Appeals, then, was whether the exception to the general rule of imputable negligence applicable between principal and agent applies; or, in its simplest form—Was their sufficient evidence of a principal-

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[1]**Read v. City and Suburban Railway Company** (115 Ga. 366, 41 S. E. 629)

agent relationship between Petitioner and her driver to submit that question to the jury. If so, then it necessarily follows that the charge on imputable negligence was authorized.

The Georgia Code defines the principal-agent relationship as follows:

> "The relation of principal and agent arises wherever one person, expressly or by implication authorizes another to act for him, or subsequently ratifies the acts of another in his behalf."
>
> Georgia Code (1933) §4-101

The Georgia courts have held that, if there is any evidence tending to establish agency, the question should be submitted to the jury. **(Warnock v. Elliott et al.,** 96 Ga. App. 778 at 789, 101 S. E. 2d 591). The fact of agency may be proved by conduct and circumstances, including declarations of the principal. **(Taylor v. Young & Company et al.,** 21 Ga. App. 40, 93, S. E. 558).

The Georgia Court of Appeals has applied the Georgia law to facts remarkably similar to the evidence in this case.

> "4. Special ground 9 (numbered 12 by counsel), assigns error on the following excerpt from the charge of the court. 'I further charge you that if you find in this case now on trial that the son of the plaintiff was acting under her direction and control and **in and about her business,** then and in that event, any negligence, if you should find negligence on the part of the son, would be imputable to the plaintiff, just as though she had committed the acts of negligence herself.' The evidence shows that the driver of the car was the minor son of the plaintiff and that he was driving the car while transporting his mother to her work. Such a situation justified the charge as given by the court."
>
> **Cornett v. McWaters et al.**
> 101 Ga. App. 120 at 122,
> 112 S. E. 2d 797.

Reviewing again the evidence here the Petitioner Mrs. Faircloth planned the trip, decided where to go, how long to stay and when to come back. She told the driver where to drive and when to leave and start back. She paid for all of the gasoline and guessed the driver was **driving for her.** (T-133).

Recently, the Georgia Court of Appeals has held that the following testimony by a principal authorized imputation of negligence:

> " 'On the day of the wreck [Wille Hightower] was working for me, driving the vehicle under my control and direction. The only purpose Willie had in the truck was to assist me in getting [to] and to do the work that I directed him to do.' "
>
> **Hightower v. Landrum**
> 109 Ga. App. 510, 516,
> 136 S. E. 2d 425.

The Court of Appeals had to look no further than the mere statement of the Petitioner Mrs. Faircloth that the driver was **driving for me** to find that the question of agency was quite properly submitted. So held the Georgia Court of Appeals in the case of **Hatcher v. Seitz et al.**

> "Felton, J. The plaintiff in error contends that the court erred in granting a nonsuit because the evidence presented a question for the jury as to agency. We agree. The plaintiff testified that the defendant Truelove told him, 'Mr. Seitz was driving the car for me.' The word 'for' as used with its context in such statement means 'on behalf of' the defendant Truelove. **Cheslea Corp. v. Steward,** 82 Ga. App. 679, 686 (62 S. E. 2d 627); **Young v. Wilson,** 183 Ga. 59, 74 (187 S. E. 44); 17 Words & Phrases, p. 215. Truelove denied having made such a statement and testified that Seitz had merely borrowed the automobile for his own personal use. Nothing else appearing, the jury could have believed the plaintiff and disbelieved all the evidence tending to disprove agency and could have found that at the time of the collision Seitz was the defendant Truelove's agent acting for and on behalf of Truelove."
>
> 87 Ga. App. 787 at 788
> 75 S. E. 2d 273.

Since it is clear that the lower Court was authorized to put the question of agency to the jury based on the acknowledgment of Petitioner Mrs. Faircloth that **he was driving for her,** there certainly can be no error, here, in view of the further evidence of agency apparent in the record and in view of the record's being completely devoid of any evidence disproving agency.

If the charge on agency was proper, then the charge in imputed negligence was authorized.

CONCLUSION

Petitioners contend that the Circuit Court of Appeals has overruled two lines of decisions in Georgia, i. e.

1. The passenger for hire decisions; and
2. The imputed negligence decisions.

This contention is absolutely without merit.

First, the passenger for hire question has no application in this case. That issue arises only when there is a claim by the passenger against his driver which requires a determination of the degree of care owed by the driver to his passenger. Although counsel for Petitioners states in his petition that the courts passed upon the question of imputable negligence in the passenger for hire decisions which he cites, we have carefully studied each such decision and cannot find the slightest reference to imputable negligence.

Second, the imputable negligence question is controlled by a rule having well-defined exceptions. This case fits squarely the exception recognized in principal and agent situations.

Applying the evidence in this case to the foregoing statutes and decisions, it is clear that the opinion of the Court of Appeals was in accord with the law of the State of Georgia. The question raised by these Petitioners was considered by the District Court and a panel of the United States Court of Appeals, all of whom have agreed that the question of the imputability of the negligence of the Petitioner's driver was a proper question for the jury to decide. Their application of

the law of Georgia was eminently correct; therefore, Respondent respectfully requests that the Petition for Certiorari be denied.

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BY: Albert W. Stubbs
Attorneys for Respondent

CERTIFICATE OF SERVICE

STATE OF GEORGIA,
COUNTY OF MUSCOGEE:

I DO HEREBY CERTIFY that I have this 17th day of February, 1969, served Petitioners by mailing a copy of the foregoing Brief of Respondent to the Honorable L. B. Kent, 311 Columbus Bank and Trust Company Building, Columbus, Georgia, 31901, attorney of record for Petitioners.

Albert W. Stubbs

Of Counsel for Respondent